IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 342.

MAPLE FLOORING MANUFACTURERS ASSOCIATION, W. D. YOUNG & COMPANY, MITCHELL BROTHERS COMPANY, ET AL., Appellants,

vs.

THE UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Western District of Michigan.

APPELLANTS' REPLY BRIEF.

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In this Index as well as in the following briefs we have used the captions contained in the Government's brief.

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MAY IT PLEASE THE COURT:

In this brief we shall for convenience adopt so far as possible the captions used by the Government in its brief.

The Government's brief cannot fail to be confusing to anyone not familiar with the record. Even when purporting to discuss the plan and the activities of the present association, the writer of the Government's brief bases his argument almost exclusively upon the evidence concerning the plans and the activities of *antecedent* associations. Unless the reader keeps this fact in mind he will accumulate more misinformation than facts with respect to the plan and the activities of the *defendant* association that was organized on March 29, 1922.

"STATEMENT OF CASE."

On page 1 it is asserted that the Government's petition "alleges * * * that the defendants, who manufacture a very large per cent of the maple, beech, and birch flooring marketed in the United States * * * *control its production*" * * *. The petition contains no such allegation. Neither is there any proof whatsoever that since the organization of the present association the defendants have ever controlled or sought to control, either directly or indirectly, the production (output?) of maple, beech or birch flooring.

On page 1 it is stated that the petition alleges that the defendants "fix minimum prices" for and control the "production" of maple, beech, and birch flooring by means of "the computation and distribution * * * of alleged average costs, [they] being in fact agreed minimum prices" * * *.

Under the rules the Government's brief in the case at bar should have been filed on Monday, November 10th. We have as yet (November 17th at 11:00 o'clock a. m.) received only 18 pages of galley proof of the proposed brief. By what means the Government intends, at this late date, to support the assertion that the average costs of the present association are in reality "agreed minimum prices" we do not know. At any rate, certain ambiguous allegations of the petition (see Appellants' Brief, pp. 11-12) are now made definite and certain. And it necessarily follows that the Government must show by means of the *record*

(1) An agreement *by the members of the present association* that the average costs distributed by it should be *minimum prices* for maple, beech and birch flooring; and

(2) *That the said members executed said agreement.*

If the average costs were in fact *minimum* prices, then the prices obtained by association members for maple, beech and birch flooring should always at least equal the average costs. If no such relation exists between the average costs and the prices obtained, then it necessarily follows, either that there was no such agreement, or else that it was not carried out. In either event, the Government's contention that the average costs are "agreed minimum prices," and that the de-

fendants by such means control "production" and market prices, is groundless. As shown in appellants' opening brief, there is no evidence of an express agreement of the kind alleged by the Government. And the undisputed proof shows that in the great majority of instances the prices obtained by association members for maple, beech and birch flooring are substantially below the average costs (pp. 336-348). Therefore the only inference that can fairly be drawn from the *facts* is that the *average costs* are what they purport to be. This is especially true, in view of the failure of the Government to adduce any proof that the elements contained in the average costs are improper, or that said costs are not honestly ascertained and reported. In view of the state of the record, the assertion that the average costs are "agreed minimum prices" is manifestly absurd.

It should also be observed that in attempting to state the substance of the Government's petition the writer of the Government's brief fails even to mention the allegations with respect to *uniformity of "f. o. b. selling prices"* and *"net delivered prices."* As shown in appellant's opening brief, the alleged uniformity of prices is the gravamen of the Government's petition (pp. 11-12, 113-114, 195-6). Does the Government intend to abandon such contention here, as it did in the court below? (Appellants' Opening Brief, p. 339.) If it does, what, then, becomes of the Government's entire case?

I.

"PERCENTAGE OF THE COMMODITY PRODUCED AND CONTROLLED BY THE DEFENDANTS."

After stating certain percentage figures with respect to the production of both members and nonmembers of the defendant association (pp. 4-5), the writer of the Government's brief draws the conclusion that "these figures are conclusive evidence that the industry is wholly dominated by the association" (p. 5).

The Government's petition does not charge that the maple, beech and birch flooring industry is dominated by the defendants. As shown on page 33 of appellants' opening brief, the said petition charges—

> "The membership of defendant association comprises *practically all of the manufacturers* of maple, beech and birch flooring within *the States of Michigan, Illinois, Wisconsin and Minnesota,* and it represents approximately *seventy per cent* of the total manufacturing *capacity* of such flooring in the United States" (Vol. I, p. 3, fol. 5).

The *proof* shows:

1. That (if the Wisconsin Land & Lumber Co. be counted as a member) the entire membership of the defendant association numbers only 22.

2. That in 1922 there were in Michigan, Illinois, Wisconsin and Minnesota *alone,* 17 *nonmember*

manufacturers of maple, beech and birch flooring (Def'ts' Ex. QQ, Vol. IV, fol. 5507, which combines certain data collected by both the Government and the appellants. See Appellants' Opening Brief, pp. 26-36).

3. That in 1922 there were 58 nonmember manufacturers of maple, beech and birch flooring in the United States who reported to the Government and/or appellants (Def'ts' Ex. QQ, Vol. IV, fol. 5507).

4. That for 1922, 38 nonmember manufacturers reported a manufacturing *capacity* of 238,610,000 feet of maple, beech, and birch flooring, whereas, the members of the defendant association in 1922 had a manufacturing *capacity* of only 158,400,000 feet (Def'ts' Ex. QQ, fols. 5506-7, Appellants' Opening Brief, p. 33).

5. That aside from the nonmember manufacturers of such flooring who reported to the Government and/or the appellants, there are numerous other nonmember manufacturers of such flooring in the United States, to say nothing of Canadian manufacturers (Appellants' Opening Brief, pp. 26-36).

6. That the defendants own a very small proportion of the total stand of maple, beech and birch timber (Opening Brief, p. 26).

In view of the foregoing undisputed facts, it is wholly beside the case to assert that the maple,

beech and birch flooring industry is "wholly dominated by the association." No such claim is made in the petition. The allegations of the petition above quoted are conclusively disproved by the evidence. The Government charged manufacturing *capacity* and then fell back on *production*.

Furthermore, the proof was that the prices of association members for maple, beech and birch flooring were usually lower than those of nonmembers, although the flooring manufactured by members was superior to that manufactured by nonmembers (Opening Brief, pp. 46-61, 113-162, 169-194).

We also demonstrated in our opening brief that the diversities existing among members, the lack of control of raw material, the number of nonmembers, the number of competing floorings, etc., etc., absolutely preclude the possibility of the domination of the maple, beech and birch flooring industry by either the defendants or any other group of manufacturers (pp. 66-75, 367-380).

Domination by defendants connotes unanimity of action. Yet the proof shows vigorous competition and fair and reasonable prices (Opening Brief, pp. 113-162).

III.

"PREVIOUS ARTICLES OF ASSOCIATION UNDER WHICH MANUFACTURERS OF MAPLE AND BEECH FLOORING OPERATED."

On page 11 of its brief, the Government admits that there were numerous successive associations

that operated under different articles. This admission is contrary to the allegations of the petition, or, rather, to *one* allegation of the petition, which is that

> "the *defendant* association has been in existence since 1895" * * * (Vol. I, p. 4).

In view of the admission above stated, why does the writer of the Government's brief usually discuss together the articles and activities of all the associations? Such a method is not only unfair and illogical, but productive of confusion.

On page 14 of its brief the Government attempts to involve in doubt what is undisputed, viz, that the old allotment plan was abandoned on March 31, 1920, and that it was never thereafter resumed. There is not only oral testimony which is undisputed, but much documentary evidence which does not admit of dispute (Vol. IV, pp. 569, 576, 454-5, 456, 447-449, 560; Vol. III, pp. 61, 63, 130; Vol. I, 77-78, 76, 146, 143-4, 165; Vol. II, p. 794). All statistical activities, as well as the allotment plan then in force, were abandoned on March 31, 1920, because of the advice of counsel given in consequence of the District Court's opinion in the Hardwood case. The allotment feature was never thereafter resumed.

The same methods are used by the Government (pages 14-15) with respect to the tentative articles of association which contemplated the organization

of an association, with an allotment plan, to exist from October 1, 1921, to July 1, 1922 (Vol. III, p. 49). As the correspondence that was introduced in evidence by the Government shows, certain manufacturers refused to sign said articles; it was agreed that unless all old members signed the said articles they were not to be binding upon those who did sign them (Vol. IV, pp. 454-456). And the evidence is undisputed that the said articles were never adopted nor operated under (Vol. I, pp. 146-147, 77-78, 143, 165; Vol. II, p. 794).

In December, 1921, this Court handed down an opinion in the *American Column & Lumber* case, whereupon all statistical activities of the association then in existence were suspended (Vol. IV, p. 818). An opinion was procured from the then association's attorneys, who carefully analyzed the opinion above mentioned (Vol. III, pp. 145-152; Vol. IV, p. 818). The organization of the present association in accordance with the written opinion of the said attorneys was thereafter undertaken (Vol. III, pp. 153-168). The organization of said association was perfected on March 29, 1922 (Vol. I, pp. 78-79, 147, 149; Gov. Ex. 15-GG, Vol. III, pp. 155-6; Gov. Ex. 52-OO, Vol. IV, p. 461).

The articles of the present association are devoid of any allotment plan (Vol. III, pp. 64-74); and there is no evidence whatsoever that the defendants, or any of them, have ever observed any such plan since the organization of said association.

On page 14 of the Government's brief it is asserted that the old allotment plans related to *production.* This is not the fact. They related solely to *shipments.* (Vol. III, pp. 54-55.)

IV.

"MINIMUM PRICE PLAN AND MINIMUM PRICE BASIS."

Under the foregoing caption the Government discusses the mere terms of certain old minimum price plans, but says not a word concerning the undisputed evidence that such plans were never enforced or observed. (See Appellants' Opening Brief, pp. 196-206.) In this connection it is merely said that Mr. George W. Keehn "claimed" that said plans were not enforced; and the distinction made by the witness between *in force* and *enforced* is criticized. The distinction drawn by Mr. Keehn between *in force* and *enforced* (Vol. I, pp. 144-146) is a sound one. The Government should be aware of this distinction by reason of its own experience with the Volstead Act, which indubitably is *in force,* but which (*alas!* or *thank Heaven!* according to one's point of view) is certainly *not enforced! Moreover, all minimum-price plans* (including the one dated July 1, 1916) *were thereafter formally vacated some three years before the Government instituted this suit* (Vol. IV, p. 529; Vol. I, pp. 144-46).

On page 26 of the Government's Brief reference is made to the suggestion of the secretary of the as-

sociation then in existence with respect to the establishing of maximum prices. This suggestion was due to the runaway market which occurred in 1919-1920, which was caused by the accumulated demand that had not been permitted to find expression during war years. The removal of the building restrictions by the Federal Government during the latter part of 1918 coincided with or was subsequently followed by large fires which destroyed important flooring mills. There also occurred during this period the I. W. W. strike, and some mills were forced to shut down. This strike was talked of for some months before it actually occurred. The large building program which was undertaken upon the lifting of building restrictions had not been completed, and contractors and others were bidding for deliveries regardless of price. The conditions that then obtained in the flooring industry were similar to those which obtain on stock exchanges in a bull market. Spreads of $10, $20, $30, $40 and $50 per thousand feet between the high and low prices for the same size and grade of flooring were common. (Vol. IV, fol. 54-55; Appendix E, p. 5, Appendices to Appellants' Brief.) Such chaotic conditions were felt to be an injustice to the public and to the Maple Flooring industry.

During the period last above mentioned the Weekly Sales Reports were inaugurated. It was not long before conditions became more stable, and the market continued to decline throughout the

rest of the year. Of course, we do not wish to be understood as even implying that the action of the market was due to the institution of Weekly Sales Reports. But the fact that shortly after the institution of the Weekly Sales Reports the market declined almost uninterruptedly is positive proof that the apprehensions of the Government with respect to the effect of the Weekly Sales Reports are wholly unfounded.

Counsel for the Government is not fair in his argument with respect to Minimum Price Plans. It is true that recommendations were made that minimum prices should be obtained. The proof, however, is undisputed that these recommendations were disregarded in actual practice. And that such Minimum Price Plans were not enforced is conclusively proved by the undisputed evidence that no fines or penalties were ever exacted, demanded or paid, and that each member did as he pleased.

On pages 44 et seq. of the Government's Brief, learned counsel invokes the provisions of certain tentative drafts which were sent out by the secretary of the association in existence immediately prior to the organization of the present association. From these rough drafts counsel attempts to deduce the intention and purpose of the defendants in the formation of the present association. Of course such purpose and intention must be determined from the articles now in force, especially in view of the fact that there is no contention that

the articles are not complete. The undisputed evidence was that the activities of the present association had been strictly in accordance with the articles of the association now in existence.

And why talk of the Minimum Price Basis dated January 6, 1921, in view of the undisputed proof that upon receipt of Mr. Nebeker's letter dated February 4, 1921, the said Minimum Price Basis was by resolution promptly and unanimously annulled? (Vol. IV, pp. 804, 800-810; Vol. I, pp. 148-9.)

V.

"CONSTRUCTION AND CIRCULATION OF LIST OR BASE PRICES."

Under the foregoing caption the Government confuses the minimum prices (or tables of values) distributed (but not observed) by antecedent associations with the *average costs* distributed by the present association. As we shall demonstrate, there is a vital distinction between the minimum prices (or tables of values) and the average costs. They are composed of different elements; they were distributed from different motives.

On page 46 of the Government's brief it is asserted:

> "In fact the Minimum Price Basis Plan has been in operation, though not under that name, ever since 1913. The members of the Association during the entire time since that date have distributed among themselves by the secretary lists designating

> what are called 'Cost Prices' of the various grades and dimensions of flooring, but which are nothing more nor less than minimum prices that are intended to be, and actually are, observed."

Then Mr. George W. Keehn's testimony is garbled so as to make it appear that he testified that there was no difference between the *average costs* and the prices which were recommended in 1913.

The witness had testified at length concerning average manufacturing and marketing *costs;* the *cost* of rough lumber; test runs, and *average costs* of flooring based thereon. Not once did he use the phrase "*cost price*" (Vol. I, pp. 104-109).

Whereupon *Mr. Fowler* (of counsel for the Government) asked the following question:

> "Q. Now, you have explained in great detail your method of arriving at what you denominate as the cost price of lumber?"

which was answered by the witness thus:

> "A. Yes, on the flooring" (Vol. I, p. 110).

We quote in the margin the garbled excerpt from the transcript as given in the Government's brief,[1] which does not correspond with what actu-

[1] "I think we commenced, originally, in 1913, under what we termed 'scientific list.' That was based on the old work of the Market Conditions Committee.

"We are using it today (Vol. I, p. 110)." (Brief, pp. 46-7.)

ally occurred immediately following the question and answer above quoted:

> "Q. That *method* has been used for how many years?
> "A. I think we commenced, originally, in 1913, under what we termed 'scientific list.' That was based on the old work of the Market Conditions Committee.
> "Q. You have been using that same *method* since—*the same general principles* —and are using it today?
> "A. We are using it today" (Vol. I, p. 110).

In the garbled excerpt contained in the Government's brief the pronoun *it* stands for "scientific list," whereas in the record *it* stands for *method.* The same general *method* has been used from 1913 to date, but the "scientific lists" and the Tables of Values (or Minimum Prices), contained not only the *average costs* of manufacturing and marketing flooring, *but also certain percentages of profit.* As shown on pages 244-280 of appellants' opening brief, the average costs contain *no element of profit whatsoever.*

For instance, Mr. George W. Keehn described the initiation of the "scientific list" as follows:

> "Q. From what source did you obtain this information which formed the basis of your original estimation or determination of these cost items and of the divisions that were to be made to the cost of manufacture?
> "A. What we call our survey of costs, manufacturing and marketing costs was de-

veloped quite a number of years ago and later on it was substantiated as a practical foundation for those elements of cost by Prospectus which we received from the U. S. Forestry regarding the sale of timber in Priest River Valley, Idaho. We have a letter here dated March 10, 1913, addressed to the Maple Flooring Mfg. Association, and signed by H. S. Graves.

"Q. Who is Mr. Graves, do you know?

(fol. 1395:) "A. The forester, United States Forester. In which they endeavored to arrive at a basis for the sale of their stumpage. The letter is rather short, perhaps it wouldn't take very long to read it. It tells the whole story instead of extracts." (Vol. II, 791.)

We set forth in the margin a copy of the letter in question.[2]

Mr. Keehn continued his testimony as follows:

"Now on page 5 of this prospectus there are certain elements we will consider in the

---

[2] UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE.

WASHINGTON, *March* 10, 1913.

Secretary Maple Flooring Mfg. Ass'n, 807 Stock Exchange Building. Chicago, Ill.

DEAR SIR: Because of the proposed sale of 267,000,000 board feet of timber in the Priest River Valley, Kaniksu National Forest, Idaho, the inclosed prospectus has been prepared. It shows how the forest service furnishes information to lumbermen who might be interested in bidding on National forest timber.

cost of logging and manufacturing, and etc. There is no use to read them all in detail, but among the ones which are similar fundamentally to what we use, the Association uses "Administration and Supervision, depreciation of equipment, interest charges, taxes and insurance." That is all summed up as to certain chances there.

An unusual feature of this sale is the fact that no part of the area of the forest will be destroyed. The object will be to clear this part of the area for agriculture instead of providing for forest renewal. Provision 8 of the "Sample Timber Sale Contract" and the provision regarding "Agricultural Land" under the head "Rules for Marking and Brush Disposal" illustrate how this will be done.

When the area has been cleared of timber and the slash burned the land will be opened to homesteading under the provisions of the "Forest Homestead Law." If the Forest Service did not sell off the timber before opening the land to entry, the value of the present stand of timber would cause the land to be held speculatively instead of being cleared for farms. But the land will be better employed growing farm crops than growing timber; and hence the Forest (fol. 1396) Service is preparing to put it into the hands of bona fide settlers, under a procedure which will insure agricultural development.

The Federal Government will receive about $650,000 for the timber, of which $225,000 will go to the benefit of the state for public schools and good roads.

The minimum stumpage price of $5 specified for the white pine on these logging chances is unusually high, because this western white pine is the most valuable stumpage on the National forests. The timber is easily worth the price, and no difficulty is anticipated in securing bids on the basis named.

The 12 per cent profit to the lumbermen allowed for in calculating the stumpage rates to be charged is exclusive of interest on the investment, which was figured at 6 per cent.

(fol. 1397:) Then we come to another one on page 6: "Administration, supervision, sealing excepted, and railway operation, maintenance of way, unloading at pond—those are just items again—interest charges, depreciation of equipment, insurance and taxes. Then they deduct for salvage and, etc.

Then we come over to page 7: "The stumpage rates appraised in the notice of sale were determined by deducting the cost of logging, milling and other expenses, plus approximately 12 per cent profit, from the present average selling prices of lumber."

Then they go on and give the stumpage prices. In other words, they appear to have taken the market value of lumber as realized from sales on the market as the foundation for arriving at the selling price of the timber. In other words, they work from there back to the stump and with us we take the market value of the rough maple lumber as ascertained by sales on the open market and we work from that foundation to arrive at the average cost of the finished flooring. It is the same fundamental principle but it is reversed in its application (Vol. II, p. 792).

The minimum prices allow, therefore, for a profit of 12 per cent on every thousand feet of timber sold, over and above interest on capital and all overhead costs. It must be remembered that the manufacture of lumber is a business which, because of the risks involved, requires a high return in order to induce operators to undertake a logging enterprise.

Very truly yours,

H. S. GRAVES,
Forester.

(Vol. II, p. 791-2.)

The method formerly used by antecedent associations is well illustrated by Government's Exhibit No. 28, Vol. III, pp. 291-293. The Court will observe that the method used in order to arrive at what the different grades and sizes of maple flooring should sell at *if 10 per cent profit were to be realized* is identical with the method employed by the present association as explained on pages 244-280, in appellants' opening brief, *except that one-ninth was added to the total costs of such flooring in order to include a profit of 10 per cent.*

The minutes of the annual meeting held on January 28, 1914, read in part as follows:

> "It was suggested that the Market Conditions Committee formulate a table of values showing what flooring would be actually worth and what it should sell for if delivered values were based by [on?] a logical and scientific method in accord with the following fundamental principles:
>
> "1. The market value of the raw material as established by current sales of rough lumber in the open market.
>
> "2. Add the cost of manufacturing and selling.
>
> "3. Then add 1/9 to represent the minimum profit of ten per cent on sales.
>
> "4. Add cost of freight or delivery."
>
> (Vol. III, p. 108.)

The Court will observe that in Government's Exhibit 28, Vol. III, p. 292, it was stated that the prices of flooring should be advanced $3.91 per M

feet *if a profit of 10 per cent on the sales were to be realized.* See particularly Government's Exhibit 28-A (Vol. III, p. 294), which was issued by the association then in existence on January 26, 1917. See also the petition to the Federal Trade Commission dated July 14, 1915. (Vol. III, p. 82.)

There is no dispute that the Tables of Values issued by antecedent associations were intended to show what the flooring should be sold at *if a 10 per cent profit on sales* were to be obtained. It is equally undisputed, however, that each member was free to do as he pleased, and that there existed during all of said period great price variation and intense competition, not only among the then association members, but between said members and nonmembers. (See pages 116-162, 196-206 of Appellants' Opening Brief.)

As shown in our opening brief, the *average costs* computed and distributed by the present association contain no elements of profit whatsoever (pp. 244-280). The inclusion of a certain percentage for profit was abandoned long before the organization of the present association (Vol. I, p. 151). Even the 5 per cent for the hazards incident to the business has been discontinued, although the undisputed proof was that the flooring industry is an essentially hazardous one, and that the said 5 per cent allowance was reasonable (Appellants' Opening Brief, p. 280).

Other than the mere distribution of the average costs (which are merely the average of the costs of reporting members) there is no proof whatsoever that any recommendations with respect to prices have ever been made by the present association. On the contrary, the undisputed proof is that no such recommendations have been made (Appellants' Opening Brief, pp. 310-313); and the great range of prices and the relation between prices obtained and the average costs constitute a conclusive answer to any assertion that the average costs are agreed minimum prices. They also render irrelevant any speculation concerning the probable effect of the distribution of average costs among association members.

It is true that during the existence of antecedent associations there was a Market Conditions Committee which recommended what prices should be. That each member was free to do just as he pleased is conclusively shown by the letter dated November 8, 1920, which the defendant W. H. Greene wrote to the John C. Hill Lumber Company of St. Paul. This letter reads in part as follows:

> "We expect there will be another meeting of the association some time this month although we do not know the exact date. However, in any event, the association does not have ironclad prices. Our Market Conditions Committee after analyzing stocks on hand, production, unfilled orders, new business, etc., merely recommends what in their

> judgment ought to be the asking price. This is merely a guide to the manufacturer and he is at liberty to quote his stock at any old price, either more or less, than the recommended values." (Appellants' Opening Brief, p. 201.)

As pointed out in our Opening Brief, the present association has never had any Market Conditions Committee, nor any other committee even analogous to the said Market Conditions Committee.

The learned writer of the Government's brief next discusses Government's Exhibits 25-A, 26, 27, and 28-N (Vol. III, pp. 280-289, 315-317). Those exhibits show the average costs of maple flooring based on certain test runs. They are dated May 31, 1922, October 25, 1922, February 15, 1923, and September 22, 1921, respectively.

On page 55, the learned writer of the Government's Brief makes the following observation:

> "It appears strange, further, that such a large percentage of No. 1 Common lumber is used in making the test runs, as Mr. Saunders testified that the better end of No. 1 Common rough Maple lumber is not generally used in the manufacture of Maple Flooring because it is not profitable to do so, as a better price can be obtained for it on the market than can be obtained by working it through the flooring factory. (Vol. 1, p. 197.)"

Mr. Saunders gave no such testimony. He testified that the better end of No. 1 Common rough Maple lumber was not generally used in the manufacture of Maple Flooring *"by manufacturers who produce their own lumber,* because it is not profitable to do so." (Vol. 1, p. 197.)

All the members of the Association do not own timber. Eight of them are compelled to purchase all the rough lumber they use. Furthermore, some members of the Assocation "use Selects and Firsts and Seconds * * * *or the entire product of the log in manufacturing flooring."* (Vol. 1, p. 405. See also Test Runs, Vol. III, pp. 276-7 (fols. 360-379), pp. 291-294, 300-304.) There is, therefore, nothing strange in the fact that 51 per cent of No. 1 Common rough lumber was used in the test runs above mentioned. If lower grades of rough lumber had been used, then there would have been a greater percentage of waste as well as greater percentages of Factory and No. 1 flooring.

Learned counsel seems to know nothing concerning either the flooring business or cost accounting, and, apparently, but little of mathematics. He states that he cannot understand how the average cost of the different grades and sizes of maple flooring is arrived at.

The burden of proof was upon the Government to establish not only that the average costs contain large profits, but that the said average costs are in

fact minimum prices. The record is barren of proof concerning what methods were used by the secretary of the association in making the distribution of the total cost among the different grades and sizes of flooring produced as a result of test runs.

There is no explanation whatsoever in the record concerning what the next to the last column of figures appearing on page 31 of this brief mean, or how they were arrived at, neither did the Government adduce any proof whatsoever that the defendants used said figures as prices.

The burden of proof was upon the Government; and having made no proof whatsoever, it is now too late for its counsel to ask questions which should have been addressed to witnesses in the court below.

It might be guessed that the Secretary of the association employs methods which are used by all manufacturers of joint-cost products. From a ton of coal a gas company will produce a certain amount of gas, a certain amount of coke, a certain amount of carbolic acid, as well as divers quantities of perfumes, dyes, and other coal-tar products. From a given quantity of crude oil a refiner will get so much gasoline, so much kerosene, so much lubricating oil, so much vaseline, so much naptha, etc. Naptha always sells for a great deal more than kerosene. Vaseline is sold in small tubes or glass bottles, whereas gasoline is

sold in large quantities. Coke is sold by the ton, perfume by the ounce. Joint-cost products differ in kind, and such products of the same kind differ both quantitatively and qualitatively. Much of one product is obtained and but little of another. The amount of labor expended on the different products varies. Their exchange value also differs greatly. Of course, so far as joint-cost products are concerned, cost accounting is not an exact science. But, according to both common sense and sound principles of accounting, the cost of any one of two or more joint-cost products is closely related to its exchange value. For instance, an oil refiner would soon be in bankruptcy if he determined that naptha cost less to produce than kerosene and fixed his prices accordingly. A manufacturer of maple flooring could easily sell all the Clear grade flooring he could produce at Factory grade prices, but he could not sell any Factory grade flooring at Clear grade prices. Is it strange, therefore, that in prorating the total cost among joint-cost products consideration is given to the exchange value of such products?

So far as the different grades and sizes of maple flooring are concerned, their exchange value is fixed largely by custom, intrinsic value, appearance, utility, demand, supply, necessary labor, waste in manufacture, value of raw material, etc., etc. And such exchange value largely determines what proportion of the total cost shall, as a matter of ac-

counting, be assigned to each of such grades or sizes. No two lumber accountants would make exactly the same distribution, but the percentage of variation would not be large.

The distribution of the cost is of no practical importance. The *total cost* is the thing. *And this total cost is a matter of mathematics.* Discretion has no part in it. The rough lumber costs so much; a given quantity of it produces a definite amount of flooring of different grades and sizes; the manufacturing and marketing costs are so much. The total cost of producing the flooring obtained can, therefore, be easily determined. So can the cost per thousand feet of flooring. This total cost is *certain. And what distribution is made of it among the different sizes and grades is manifestly immaterial so long as the aggregate cost of all grades and sizes equals the total cost.*

All the foregoing facts are elementary and are well known to lumber accountants. The appellants care so little about the distribution of the total cost among the several grades and sizes that they have no objection whatsoever to eliminating it from their surveys of costs.

But what difference does it make what methods the secretary of the association uses in computing the "approximate relative-average costs?" The average costs issued by him are binding upon no one. Each member of the association is absolutely

free to sell his flooring at any price he pleases. And the evidence shows the greatest range of prices. In fact, the great bulk of the flooring produced by association members is sold at prices substantially below the average costs (Appellants' Brief, pp. 336-348). *This wide range of prices is explained by the diversities mentioned on pages 66-75 of our opening brief and by the absence of any agreement with respect to either production or prices.*

Furthermore, the evidence is undisputed that each member keeps his own costs (the secretary merely reports the *average* of the costs of association members), and that each member also independently determines his own prices (Appellants' Opening Brief, pp. 322-335).

The Government did not adduce a word of proof that any elements entering into the average costs are improper; it adduced no evidence whatsoever of dishonesty or inefficiency with respect to the making of any report or test run. The burden of proof rested upon the Government. Its failure to sustain that burden cannot now be obviated merely by means of interrogations which should have been addressed to *witnesses* in the court below.

Learned counsel asserts that

> "there is nothing to show that the waste of manufacture of one grade of rough lumber is greater than that of another" * * * (p. 57).

Of course such a statement is wholly absurd. On page 56 of the Government's brief it appears that the following grades of rough lumber were used in a test run, and that at the time the average costs were ascertained the market value per thousand feet of the different grades of rough lumber used was as follows:

No. 1. Common	$39.50
No. 2. Common	24.50
No. 3. Common A	11.50

The great difference in value of the three grades above mentioned is ample proof that in converting rough lumber into flooring there is considerably more waste in No. 3 Common A than there is in either No. 2 or No. 1 Common.

By referring to Government's Exhibit 24 (Vol. III, pp. 276-77, fol. 360) the court will observe that certain test runs were made by different members. We set forth below the grades of rough lumber used by number 24 (Kerry & Hanson Flooring Company) and number 47 (Grand Rapids Trust Company, receiver for William Horner), respectively, together with the amount of waste, as well as the amount (in grades) of flooring produced.

Rough Lumber Used.

	By No. 24.		By No. 47.	
	Feet.	%.	Feet.	%.
No. 1 Com.....	276,349	46%	68,025	62%
" 2 "	155,381	26 "	32,425	29 "
" 3 " A.....	.....	....	10,304	9 "
" 3 Com.....	169,788	28 "	.....	....
	601,518	100 "	110,754	100%
Flooring Produced:				
Clear	117,534	27%	46,692	51%
No. 1.....	235,335	54 "	34,355	37 "
Factory	82,514	19 "	11,130	12 "
	435,383	100 "	92,177	100 "
Waste	166,135	27.6%	18,577	16.8%

From each 1,000 feet of rough lumber used No. 24 obtained only 724 feet of flooring, whereas No. 47 obtained 832 feet of flooring. It will also be observed that the percentages of the different grades of flooring (which are stated in the order of their excellence) varied markedly.

The grades of rough lumber are also above stated in the order of their excellence; and it is obvious that the large percentage of No. 3 Common used by No. 24 accounts for that member's large percentage of waste.

Learned counsel next asserts:

> * * * "and the cost of manufacturing the different grades of flooring is the same, or practically so" (p. 57).

As pointed out on pages 278-280 of our opening brief, the above statement is demonstrably incorrect.

The learned counsel then proceeds as follows:

> "Therefore the only element upon which to base a difference in the *cost* prices of different dimensions of flooring is the difference in the prices of the grades of rough lumber; and it does appear that the *average* of the grades of the finished product bears about the same relationship to the prices of the grades of rough lumber. That is, the average prices of the different dimensions of 'clear' flooring is a little more than twice as much, as the price of 'No. 1 Common' rough lumber, and the same is true as to No. 1 and factory grades of flooring and No. 2 common and No. 3 common-A of rough lumber" (pp. 57-58).

Of course the cost of rough lumber (or raw material) is not "the only element" that determines the costs of the different grades and sizes of flooring. There are the manufacturing and marketing costs which usually constitute about 25 per cent of the total costs (Vol. II, p. 685); and, as shown in Appendices H, I, J, K, L, and M (pp. 9-17), these costs fluctuate.

The rest of the argument of learned counsel above quoted is wholly unsound for the following reasons:

In Government's Exhibit 25-A (Vol. III, p. 280), the flooring produced was as follows:

Flooring Product.

Clear	646 M ft.	52 %
No. 1	382 " "	30.7%
Factory	215 " "	17.3%
	1,243 " "	100 %
Waste	296 " "	19.2%
Lumber used	1,539 " "	

The flooring product consisted of the following percentages of the several grades, thicknesses and faces, or widths:

Clear:

13/16 x 1¼"	2.5%	$85.	$2.13
2"	3.3 "	87.	2.87
2½"	41.7 "	90.	37.53
3½"	2.1 "	85.	1.79
3/8 all faces	2.4 "	60.	1.44
	52. %		$45.76

No. 1:

13/16 x 1¼"	1.3%	$68.	.88
2"	2.5 "	72.	1.80
2½"	24.9 "	75.	18.68
3½"	.7 "	75.	.53
3/8 all faces	1.3 "	45.	.59
	30.7%		$22.48

Factory:

13/16 x 1¼"	.7%	20.	.14
2"	.9 "	28.	.25
2½"	14.7 "	30.	4.41
3½"	.8 "	35.	.28
3/8 all faces	.2 "	10.	.02
	17.3%		5.10
Totals	100.%		$73.34

The average cost per thousand feet of flooring f. o. b. cars flooring mills was $73.53, which was made up as follows:

Rough Lumber Used.

792 M ft. No. 1 Common	51.5%
562 " " No. 2 Common	36.5 "
185 " " No. 3 Common A	12.0 "
1,539 M ft.	100. %

Cost of Rough Lumber f. o. b. Cars Flooring Mills.

51.5% No. 1 Common @ $51.00	26.27
36.5% No. 2 Common " 36.00	13.14
12. " No. 3 Common A @ 22.00	2.64
100%	
1,000 ft. lumber costs	42.05
[2]808 " flooring costs	42.05
1,000 " flooring costs	52.04
Manufacturing and marketing costs, first quarter 1922, average	17.99
	70.03
Add 5 per cent for contingencies	3.50
Average cost f. o. b. flooring plant of 1,000 ft. of flooring sold	73.53

If by "average *prices* of the different dimensions of 'clear' flooring" learned counsel means the *simple* or arithmetic average of the figures in the next to the last column on page 31, *supra*, it is

[2]Because the waste was 192 feet per 1,000 feet of rough lumber. The total amount of flooring produced from 1,539 M feet of rough lumber was 1,243 M feet. The waste, therefore, was 296 M feet, or 19.2 per cent.

clear that his assertion is not borne out by the facts. The simple averages of the figures for the three grades are set forth below and compared with the prices of the rough lumber multiplied by two:

Simple Averages of Flooring "Prices."		Prices of Rough Lumber Multiplied by Two.	
Clear	$81.40	No. 1 Common,	$51.00 x 2 = $102.00
No. 1	67.06	No. 2 Common,	36.00 x 2 = 72.00
Factory	24.60	No. 3 Common A,	22.00 x 2 = 44.00

The other test runs discussed by learned counsel (Government's Exhibits 26, 27, and 28-N, Vol. III, pp. 284-289, 315-317) give the results set forth in the margin.[4]

It is certain, therefore, that the "average prices of the different" grades of flooring are *not* "a

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[4] GOVERNMENT EXHIBIT 26, VOL. III, p. 284.

Simple Averages of Flooring "Prices."		Prices of Rough Lumber Multiplied by Two.	
Clear	$84.00	No. 1 Common,	$56.00 x 2 = $112.00
No. 1	72.60	No. 2 Common,	41.00 x 2 = 82.00
Factory	32.00	No. 3 Common A,	26.00 x 2 = 52.00

GOVERNMENT EXHIBIT 27, VOL. III, p. 287.

Clear	87.00	No. 1 Common,	61.00 x 2 = $122.00
No. 1	75.60	No. 2 Common,	41.00 x 2 = 82.00
Factory	37.00	No. 3 Common A,	30.00 x 2 = 60.00

GOVERNMENT EXHIBIT 28-N, VOL. III, p. 315.

Clear	79.60	No. 1 Common,	39.50 x 2 = 79.00
No. 1	54.20	No. 2 Common,	24.50 x 2 = 49.00
Factory	20.00	No. 3 Common A,	11.50 x 2 = 23.00

little more than twice as much" as the prices of the grades of rough lumber.

Learned counsel's theory of relativity is further elaborated as follows:

> "It might be claimed that the prices of the several grades of flooring should be increased or diminished according to the advance or fall of the prices of the corresponding grades of rough lumber. In other words, there are three grades of rough lumber used in the manufacture of the three grades of flooring; *and no doubt most of the clear flooring is manufactured from No. 1 Common, and No. 1 flooring is made from No. 2 Common, and the factory flooring is made from No. 3 Common A lumber.* The witness Green testifies in effect that such is the fact (Vol. I, p. 386). Therefore, there may be reason in increasing or diminishing the prices of clear flooring in proportion to the advance or fall of the price of No. 1 lumber, and the same is true as to No. 1 flooring and No. 2 Common lumber, and factory flooring and No. 3 Common A lumber" (pp. 59-60).

Of course the prices of the grades of rough lumber *do* affect the *total cost* of all flooring produced. They also affect the *costs* of all grades and sizes of flooring, but not in the same proportions, for the simple reasons that different quantities of the several grades and sizes are produced, and that the said grades and sizes have widely varying exchange values. The prices of the several grades of rough

lumber also affect the *prices* of the grades and sizes of flooring produced, but not in the same proportions, for the reasons above stated.

Learned counsel's assertions that clear flooring is made of No. 1 Common rough lumber; that No. 1 flooring is made of No. 2 Common, and that Factory flooring is made of No. 3 Common A, are in direct conflict with the undisputed proof on this subject.

Mr. Hamlin J. Ward (a nonmember manufacturer) testified:

> "Grades of flooring depend very largely upon the grades of lumber used, that is, so far as the *percentage* of each grade is concerned. A thousand feet of lumber will make a *number of items of different grades and sizes.* There are *three grades,* Clear, No. 1, and Factory, and *there are several widths* which *must* be made in order to avoid waste. The *product* of *every* thousand feet of *rough lumber will consist of flooring of each width and grade.* In other words, in manufacturing flooring all three grades are made at the same time" (Vol. I, p. 94).

Mr. William L. Saunders testified:

> "The manufacturer has no choice as to the grades he will produce. *All three grades of flooring can be manufactured from cull lumber.* We *cannot,* for instance, manufacture Clear flooring at one time, No. 1 at another time, and Factory at another" (Vol. I, p. 199).

There is no proof to the contrary, but there is much other evidence along the same line (Vol. I, pp. 239, 386, 389-390; Vol. II, p. 591). Counsel's assertion concerning the testimony of Mr. Greene is not true. Mr. Greene testified as follows:

> "A. It is generally understood in the manufacture of maple flooring, that in the process of manufacture all three of the grades, Clear, No. 1, and Factory are produced at the same time. It is also true, however, that a manufacturer can manipulate his rough lumber by putting through certain qualities of rough lumber into his plant to produce the *largest percentage* of any one grade at any given time.
>
> "Q. What will produce the largest *percentage* of Clear and No. 1?
>
> "A. Well, the quality—that would run largely to No. 1 common and No. 2 common, particularly No. 1 common.
>
> "Q. What will produce the largest *percentage* of Factory?
>
> "A. I would put in my plant 3-A and possibly straight and 3-A and B combined. I am producing that at the present time. I realize from analyzing those statistics and from other sources of information that there is a great demand for factory flooring right (fol. 688) now, and I fully realize most of the manufacturers are loaded up with orders on it, and I am putting through my plant stock No. 3-A and B which I know will produce from experience anywhere from *forty to sixty per cent* factory grade, *that is, forty to sixty per cent of my total grade will*

> *represent factory.* On the other hand, if I put through certain stock which I have purchased from the Louis Sands Lumber Company, which is Michigan southern maple, very high grade, running about seventy per cent No. 1 Common, thirty per cent No. 2, I know that particular lot of lumber when manufactured into flooring, *would produce not to exceed fifteen to eighteen* [per cent of] *factory,* the balance 82, 85 [per cent of] No. 1 [and] Clear, * * *" (Vol. I, p. 386).

See also, the test runs made by member No. 24 (Kerry & Hanson Flooring Company) and member No. 47 (Grand Rapids Trust Company, Receiver for William Horner), which are shown on page 29 *supra.*

It was also testified that "the better end of No. 1 Common rough maple lumber" is not generally used in the manufacture of maple flooring by manufacturers who produce their own lumber, for the reason that they "can get a better price for that class of rough lumber than" they can "by working it through the flooring factory" (Vol. I, pp. 197-198). There have been times when even No. 1 Common sold for more than the best grade of flooring (Vol. I, p. 198).

Learned counsel then asks:

> "But in estimating costs, what justification is there for making a difference in the advance of the different dimensions of the same grade?" (p. 60.)

Learned counsel also asks why should there be a difference in the *cost* of the following items of 13/16-inch Clear maple flooring: 1½-inch, 2-inch, 2¼-inch, and 3¼-inch. He also asks various other questions concerning the other items of flooring listed in Government's Exhibit No. 28-N, Vol. III, p. 315 (Brief, pp. 60-61).

These questions are somewhat belated. Learned counsel should have addressed his questions to witnesses in the trial court. The burden of proof was on the Government. As heretofore explained, the distribution of the total cost among the different grades and sizes admits of the exercise of a limited discretion. The total cost, however, admits of no discretion.

All grades and sizes will not bring the same price. Owing to the widths of rough lumber, there is greater waste in manufacturing some faces than other faces in the same grade. Some faces must be manufactured in order to avoid waste of raw material regardless of the demand for them (Vol. I, p. 199). The demand for all sizes and grades fluctuates, and necessarily all manufacturers of joint-cost products take all these factors into consideration in arriving at the costs of the different products.

And since when has it become unlawful for business men to study costs, or to communicate to one another an opinion as to the "approximate relative average costs" of joint-cost products? So long

as each man determines his own costs for himself and his own prices, who is, or can be, harmed? And, as pointed out in our opening brief, the *proof is undisputed that each member determined his own costs and fixed his own prices* (pp. 322-335).

It is, of course, unnecessary to notice learned counsel's assertions as to what "undoubtedly" happened after the issuance of the various average costs (Brief, p. 68). This is pure speculation on his part. The Government adduced no proof whatsoever on the subject. And, as shown in our opening brief, the *average costs followed the prices and not vice versa* (pp. 345-346).

Learned counsel next asserts that the costs of the different members of the association differ (p. 69). Of course they do; otherwise there would be no *average* manufacturing and marketing costs for the secretary to report.

Counsel also asserts that half the association members produce their own rough lumber, and that they "necessarily have an advantage over those who purchase their raw material." This advantage, however, consists in the profit, if any, that arises from the production of rough lumber. Why should any owner of timber produce rough lumber for his flooring factory at a loss rather than sell his rough lumber on the market at a profit? Mr. Saunders testified that his corporation sold rough lumber when it was unprofitable to convert it into flooring (Vol. I, p. 200). The record does not show

what the other members did. The record *does* show that the following assertions of learned counsel are groundless:

> "And the price lists distributed among the members, and which they are expected to observe, are not based upon the actual cost of production of any one of the members. Each member fixes his selling price upon a *common* cost of production and not upon *the actual cost to him;* and this within itself is a regulation by combination of the price of flooring, and is a restraint of trade within the meaning of the Antitrust Act" (p. 69).

In the first place, mere reiteration that the *average costs* are "price lists" is not proof of anything except the weakness of the Government's case.

Of course, by definition, *average* costs are *not* the *actual* costs of *any* member, except by coincidence.

The assertion of the Government's counsel that "each member fixes his selling price upon *a common* cost of production and not upon *the actual cost to him*" is wholly untrue. There is no evidence whatsoever in the entire record to justify or excuse any such statement. The undisputed evidence is to the contrary (Opening Brief, pp. 319-335).

It is just because the costs of association members differ that the prices obtained by them for

flooring have such a wide range, and that they differ so markedly from the *average* costs.

VI.

"BOOK SHOWING ESTIMATED FREIGHT RATES AND VALUES OF FLOORING AT POINTS OF DELIVERY."

Under the foregoing caption the writer of the Government's brief discusses the contents of the freight-rate books which were issued by the various antecedent associations, as well as the freight-rate books issued by the present association, and, as usual, makes no distinction whatsoever between former practices and present practices. For instance, it is asserted that the freight-rate books showed not only the freight rates from Cadillac, Mich., but also "the prices of lumber [flooring?] delivered at thousands of designated points." (p. 70.) As shown on pages 281-301 of our opening brief, the freight-rate books issued by the present association have never contained any prices whatsoever.

It is true that in connection with the minimum price plans Tables of Values were issued by previous associations. Such Tables of Values were intended to show what the flooring was worth delivered at points mentioned in the freight-rate books, *if* cost plus 10 per cent profit were to be realized. See, for instance, Volume III, folios 697-708, where certain pages of a freight-rate book in

use during January, *1921,* are reproduced. The sheets contained in the book then in use were headed

"TABLE OF VALUES

BASED ON AVERAGE COST."

As heretofore explained, the Table of Values was based on average cost, but there was included a percentage of profit. In our opening brief the undisputed testimony of numerous witnesses, that the minimum price plans were never enforced, and that each member sold his flooring for what he pleased, is quoted (pp. 196-206). In Point IX of our opening brief, pages 336-348, we also demonstrated that the oral testimony above mentioned was true, because a comparison of the Table of Values with the prices actually obtained showed that the great bulk of the flooring sold by members of former associations was at prices substantially below the figures contained in the Tables of Values. *No Table of Values has ever been issued by the present association.* See volume III, folio 881, where a sheet of the freight-rate book in use on May 31, 1922, is reproduced. (The court will recall that the organization of the present association was completed on March 29, 1922.) The sheet last above mentioned is headed

"AVERAGE COST CHART."

It contains the *average cost* of the different faces of 13/16 maple flooring, in the Clear, No. 1, and

Factory grades, f. o. b. cars flooring mill. As heretofore explained, the average costs issued by the present association include no profit whatsoever. (See, also, pp. 234-280 of our opening brief.)

On page 71 of the Government's brief the assertion is made that

> "Cadillac is fixed as the arbitrary point from which freight rates are computed. But the rate charged is not always the actual rate from Cadillac to point of delivery," * * *

For the reasons explained in our opening brief, the freight rates contained in the freight-rate books are the freight rates from Cadillac, Mich., to some six or seven thousand points throughout the United States, for the reason that the average freight rates from Michigan and Wisconsin producing points to the principal consuming centers approximately equal the average freight rates to said markets from Cadillac, Mich. (pp. 281-291). On pages 101-103 of our opening brief the undisputed testimony shows that all purchasers of maple, beech or birch flooring pay to the railroad company the *actual freight from point of origin to point of destination,* and not the freight from Cadillac, Mich., to point of destination, unless, of course, the shipment originated at Cadillac.

The freight rates contained in the book were compiled by traffic experts from official railroad

tariffs, and the said rates are in all respects correct with the exception, however, that fractions of one-half cent and under are disregarded (Opening Brief, pp. 283-291).

The Delivered Cost Charts are misrepresented by counsel. It is, however, unnecessary to go into this matter again, inasmuch as Delivered Cost Charts are not now distributed by the present association. The whole matter of Delivered Cost Charts is covered on pages 292-293 in Appellants' Opening Brief.

Notwithstanding the undisputed evidence that there was never any uniform practice by the members of any of the associations with respect to terms of sale, counsel quotes without comment or explanation the terms of sale that appeared in one of the freight-rate books (pp. 74, 79). This matter is fully covered in Point II of Appellants' Opening Brief, pages 104-112.

The same method is pursued by counsel with respect to the "differentials." Differentials are not now issued by the present association, and there is no proof in the record that the differentials issued at any time were ever observed or that they were ever considered binding upon any members. On the contrary, the undisputed proof shows that they were not observed. (See pp. 293-299 of Appellants' Opening Brief.)

VII.

"STATISTICS."

The writer of the Government's brief is neither fair to the appellants nor frank with this court. A typical instance of this attitude which permeates the entire brief is the reference to

> "a *slight change* which Mr. Keehn *claims* has been made in the system since the institution of the suit" (p. 88).

The "slight change" was as follows:

1. Elimination from freight rate books of
   - (*a*) Delivered cost charts.
   - (*b*) All matters relating to differentials.
   - (*c*) All matters relating to terms of sale and cash discounts.

2. Radical changes in the reporting system pursuant to the resolution of *July 19*, 1923, which is set forth in the margin.[5]

After the changes had been worked out by the association's secretary and its attorneys the mem-

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[5] "*Resolved*, That in order to meet the special objections of the Department of Justice the association's counsel, in conjunction with the secretary, be and are hereby authorized and directed to make such changes and modifications as they may decide upon in the compilation and distribution of statistical data to the membership of the association" (Vol. IV, p. 812).

bers were advised of them by means of a letter from the secretary, dated *August 2,* 1923, which is as follows:

> "The association membership numbers which identify the individual members of the association have been eliminated from all our reports issued since July 19, and are to be eliminated from all reports issued hereafter by the association so that the information which is consolidated and transmitted to the members from time to time will not disclose to any member or members any of the particulars or intimate details of any other member's business respecting his stock on hand, unfilled orders, shipments, production, and new orders booked, or which will identify the average prices he realizes or identify as his prices the prices at which he sells any Maple, Beech or Birch Flooring" (Vol. IV, pp. 813-814).

3. Elimination from the average costs of 5 per cent for contingencies (Vol. IV, pp. 811, 814).

Another instance of counsel's unfair attitude is the assertion that

> "an analysis of the reporting system clearly shows that there is *no* information withheld by one member from another, and that *every one* is *perfectly familiar,* not only with summaries which show the exact market conditions generally, but also with the *exact condition* of the business of *each* of his fellow members" (p. 100).

Of course the foregoing assertion is not true. As shown in our opening brief, the statistics distributed by the present association are fragmentary. (p. 381.)

The reports made *to* the secretary differ from those made *by* the secretary, especially since the resolution discontinuing the use of identifying numbers. And no member of the association either does or can learn from either the statistics or any other source *"the exact condition of the business of each of his fellow-members."*

Another instance of the Government's unfair attitude is that in the discussion of the statistics not a word is said of the abandonment of comments, analyses, and interpretations of the statistics upon the organization of the present association. Neither is the publication of the statistics by the association mentioned, nor is the association's offer made in open court to pay for the publication of all the statistics as advertising matter.

All efforts made by the defendants in order to conform to the law or in order to meet the objections made in the Government's petition are asserted to have been made for sinister and ulterior purposes. For instance, the defendants' abandonment of the use of identifying numbers in their reports is declared to have been a mere subterfuge without any practical effect. It is asserted that the division of the members of the association into groups for reporting purposes was to enable all

members to identify as nearly as possible the members by whom sales had been made. Of course the foregoing assertion is not true. As the Government's brief shows (pp. 90-91), even when identifying numbers were used, many of the reports gave both the identifying numbers and the groups in which the several mills were located. The practice varied. The evidence was that each association mill endeavored to take advantage of its geographical position in disposing of the flooring manufactured by it (Appellant's Opening Brief, pp. 284-290). This means that some members sold largely in the Middle West, others in the East, others in the Northwest, and so forth. The division of association mills into the following groups: Group No. 1, Eastern Lower Michigan Mills; Group No. 2, Western Lower Michigan Mills; Group No. 3, Upper Michigan Mills; Group No. 4, Wisconsin Mills, and Group No. 5, Chicago, St. Paul and Tupper Lake Mills, is a natural one. Such a division divides the producing mills into different centers of production, with the exception of the St. Paul, Chicago, and Tupper Lake Mills. These mills last mentioned were put into a group by themselves for the reason that they did not belong to any other natural group, and that the three mills had to be put together in order to avoid disclosing their identity (Vol. I, p. 130).

Considerable pains are taken to show that prior to July, 1923, the reports were made in a certain sequence. Counsel asserts that in all reports pre-

vious to the discontinuance of identifying numbers a certain sequence was observed. Counsel next asserts:

> "*The record does not contain any statement as to the present grouping of the members,* but it appears quite obvious * * * that the members constituting each group are now as follows:

Grouping After July, 1923.

"Eastern Lower Michigan Mills.	Western Lower Michigan Mills.	Upper Michigan Mills.	Wisconsin Mills.	St. Paul, Chicago, Tupper Lake.
2	3	7	23	22
24	5	42	34	48
33	14	44	45	51"
49	26	47	50	
	30			
	37			

(p. 94.)

It is then argued:

> "It is only necessary to *assume* that the *same* reporting *sequence* has been followed since July, 1923, to ascribe with absolute certainty the figures as to average prices realized as given by the report dated October 19, 1923 (Vol. III, side page 2863), to the several members of the association. A footnote to this report states that No. 3, which, according to sequence, should appear first in Group 2, made no sales, and that no reports were received from numbers 23, 37, and 45, which, according to the sequence, should appear respectively last in Group 2 and first and third in Group 4" (pp. 94-95).

Learned Counsel then asserts that:

> "Any member of the Association could therefore readily complete this report so as to make it read in part as follows:" (p. 95).

Learned Counsel then sets forth *only a part* of the Report dated October 19, 1923, viz., the average prices realized for *clear* grade flooring—and attempted to apply his sequence system to such prices.

We set forth the report dated October 19, 1923, together with the alleged sequence numbers enclosed in bold-face parentheses:

Range of Average Prices Realized.

F. O. B. Michigan and Wisconsin Flooring Mills in September, 1923, for New Orders Booked for 13/16 Inch x 2¼ Inches Clear, No. 1, and Factory Maple Flooring, Standard Grades and Lengths, After Deducting Freight.

Group 1:

	Clear, September.	No. 1, September.	Factory, September.
Eastern Lower Michigan Mills.	(2) $95.00	(2) $85.64	(2) $47.25
	(24) 96.42	(24) 85.80	(24) 50.10
	(33) 100.33	(33) 90.80	(33) 50.71
	(49) 101.15	.....	.....
Average	98.23	87.41	49.35

Group 2:

Western Lower Michigan Mills.	(5) 93.73	(5) 83.66	(5) 46.47
	(14) 94.89	(14) 84.92	(14) 48.94
	(26) 95.01	(26) 85.01	(26) 52.00
	(30) 95.91	(30) 85.90	.....
Average	94.89	84.87	49.14

Group 3:

Upper Michigan Mills.	(7)	96.40	(7)	83.41	(7)	46.49
	(42)	97.85	(42)	88.70	(42)	47.38
	(44)	98.14	(44)	88.80	(44)	47.85
	(47)	102.18	(47)	89.00	(47)	50.45
Average		98.64		87.48		48.04

Group 4:

Wisconsin Mills.	(34)	97.17	(34)	90.00	(34)	49.11
	(50)	102.36	(50)	90.85	(50)	52.91
Average		99.77		90.43		51.01
All Michigan & Wisconsin Mills, average.....		97.61		87.11		49.14

Includes reports from 14 members.
No. 3 reported "No sales."
No reports from Nos. 23, 37, and 45.
Reports of Nos. 48, 22, and 51 omitted to avoid disclosing their identity.
October 19, 1923.

(Vol. III, fol. 2863.)

Learned counsel asserts that by means of his sequence system it can be determined who received any of the prices contained in the report last mentioned. The assertion is manifestly absurd. The report gives the range of average prices realized by all reporting association members during September, 1923, for new orders booked for 13/16 x 2¼ Clear, No. 1, and Factory Maple Flooring after deducting freight. It will be observed that in every instance the *lowest* prices for each grade are given first, and that the next higher prices follow, and so

on until the highest prices are reached, when the average is given for each group. *In order to apply learned counsel's sequence system* (which resembles the systems devised to beat the bank at Monte Carlo) *it would be necessary for No. 2 always to receive the lowest average prices,* not only for *Clear* Grade Flooring, but also for No. 1 Flooring, and Factory Flooring. It would also be necessary that No. 24 should always receive the next higher prices for each of the three grades above mentioned, and that No. 33 should always receive the next higher prices, and that No. 49 should always receive the highest prices of all the members composing the Eastern Lower Michigan Mills group. It would also be necessary that this same rigid order should be observed with respect to the prices received by the various members constituting the other groups. There is about one chance out of several hundred millions that learned counsel's sequence system would ever work out in actual practice.

It is ridiculous to assume that the member having the lowest membership number always gets the lowest prices, and that the member having the highest membership number always gets the highest prices. According to this system all that a member needs in order to get high prices for his flooring is to have a high membership number assigned to him.

It is manifestly impossible to tell who obtained the averages shown on the report above mentioned. It is equally impossible to determine who made

any particular sale shown in the weekly sales reports after the elimination of identifying numbers.

After asserting in galley proof that his sequence system was as certain as the methods used by astronomers in calculating the courses of the stars, learned counsel in page proof finally makes the following admission:

> "The individual sales appearing on the Weekly Sales Reports as now made up cannot always be attributed with mathematical certainty to the several members of the association." (p. 96.)

The foregoing admission simply destroys the pages of argument and the vast amount of labor which learned counsel has expended upon the discovery and formulation of his *sequence system*. It is obvious that the value of any such system as applied to the reports lies solely in its always producing the same results. Any element of uncertainty incident to its operation would render it worse than useless.

The absurdity of counsel's *sequence system* may be demonstrated by means of an examination of the reports issued after the discontinuance of the use of identifying numbers. For instance, learned counsel asserts that the Weekly Sales Report dated November 9, 1923, shows that for the week ended November 3, 1923, the Eastern Lower Michigan mills made *ten* sales divided among four members of the group; that the Western Lower Michigan

group made fifteen sales divided among five members of the group (No. 37 having made no report); that the Upper Michigan mills made fifteen sales, divided among four members of the group; that the Wisconsin mills made four sales, divided among three members of the group (No. 23 having made no report), and that the St. Paul, Chicago, and Tupper Lake mills made two sales divided among two members of the group (No. 22 having made no report). (p. 96.)

As an inspection of the foregoing report will show there were *thirty-seven* separate items reported by the Eastern Lower Michigan mills, as well as one item of 1,484 feet "in four small sales" and another item of 5,950 feet "in small sales" (Vol. 4, fol. 5340).

Counsel is just as inaccurate in his assertions with respect to the number of other sales made by other members of the different groups. It is to be regretted that learned counsel for the Government did not state in the brief what system, if any, he used in determining the *number of sales* made by the members of the different groups.

Learned counsel asserts

> "An inspection of the report indicates that it is the present practice to report all sales made by each member in the numerical sequence of their order dates so that a *change from a late to an earlier date incurs a change in the reporting member.*" (p. 97.)

It will be remembered that there are four members in the Eastern Lower Michigan mills group (see p. 94 of Government's Brief). We set forth the dates appearing in the report under discussion for the sales made by the Eastern Lower Michigan mills group:

10-16	10-29
10-25	10-30
10-26	10-31
10-27	11- 2 (Vol. IV, fol. 5340).
10-29	
10-30	

Applying learned counsel's formula above quoted, we find that from October 16th to October 30th would represent the sales made by one member, and that from October 29th to November 2d would represent the sales made by another member.

Quaere: What becomes of the other two members?

Mr. George W. Keehn testified:

> "We have no objection to eliminating from our reports all reference to the particular members failing to report, and we will eliminate such references hereafter. We will omit the numbers of members who do not report, but simply state that two or three or four members have not reported, without giving their numbers. We will also omit the surplus-stock statement and dates of reports received" (Vol. I, p. 176).

If any doubt exists as to the good faith of the association in the elimination of identifying numbers, it would be very easy to prescribe a form for the making of reports which would make it impossible to determine by whom the sales reported were made.

From the Government's cross-examination of defendants' witnesses it is apparent that the Government's objection to the making of any weekly sales report was the possibility, or rather the probability, that members who did not receive as much for their flooring as other members would immediately increase their prices.

Such defendants as testified stated that there were many factors taken into consideration in the determination of prices charged by them. These factors were individual stock conditions, individual unfilled orders, the general market trend, information received from representatives and buyers, past relations with prospective purchasers, their financial needs, operating conditions or plans, etc., etc. All the defendants testified that, of course, they wanted to get as much money as possible for their flooring, but that the mere fact that the weekly sales reports showed that some one else had obtained more or less for flooring than they had obtained, would not alone cause them to either increase or lower their prices. That the Government's objection is without merit, and that its apprehensions are groundless may be easily demon-

strated. The wide spread of prices obtained by association members is conclusive proof that association members do not increase or lower their prices merely because the weekly sales reports disclose that some members had obtained higher or lower prices than others. This wide spread has always existed. (See Appendix E, pp. 5-6, Appendices to Appellants' Brief.) If the Government's theory were corect, then the prices obtained by members would be uniform, or else there would be a constant increase in prices.

VIII.

"ASSOCIATION MEETINGS."

Much of the Government's brief is devoted to a discussion of the foregoing caption. We have fully covered the matter of association meetings in our opening brief (pp. 231-233). It is therefore only necessary to point out that the Government's petition does not charge that at such meetings there was any agreement, express or implied, with respect to prices to be charged for flooring. On page 141 of its brief the Government quotes a letter addressed by the North Branch Flooring Company to another member. This letter urges regular attendance at association meetings by such other member. The letter concludes:

> "We can say from actual experience that the personal contact and association with the other members has become very valuable

> to us, and we have been able to capitalize this to a remarkable degree" (Vol. IV, p. 479).

It is obvious that the writer of the letter was speaking of some *personal* advantage which he had obtained by reason of constant attendance. It is not difficult to infer from the evidence what this advantage was. As shown on page 66 of our opening brief, the North Branch Flooring Company of Chicago, Ill., does not own any timber. It is therefore compelled to buy all the rough lumber used by it in the manufacture of flooring. Inasmuch as the proof showed that

> "association meetings afforded manufacturers of rough lumber opportunities for selling it to the other members, and for different members to sell surplus flooring to others who were short of certain sizes or grades (Vol. 1, pp. 205-6, 330, 332, 295-98, 132, 134, 178, 206, 208, 236" (p. 232 of Appellants' Opening Brief),

it is not a strained construction that the North Branch Flooring Company had been able to purchase to advantage both rough lumber and flooring from other members. Personal contact in business transactions, even with friends, is always more satisfactory than correspondence.

IX.

"Results of Combination."

The writer of the Government's brief denies that in the court below the Government abandoned its contention that there existed a practical uniformity of "f. o. b. selling prices" and "net delivered prices." However, it is not disputed that when the Lewis compilations, based upon all the weekly sales reports, were offered in evidence, Mr. Fowler stated to the trial Court:

> "*We are not insisting on uniformity*" (Vol. II, p. 857).

And, strangely enough, this statement was made in order to induce the court below to accept the Government's theory that the commissions should not be deducted from the delivered prices reported by members. These reports gave not only the date, the quantity, the wood, the grade, size, delivered price, and average freight rate, *but also the commissions allowed, if any.*

Now, if the Lewis compilations were not introduced in evidence for the purpose of showing uniformity of prices, then they were irrelevant. As pointed out in our opening brief, practical uniformity of "f. o. b. selling prices" and of "net delivered prices" is the crux of the Government's petition.

It is asserted in the Government's brief that

> "The Government contended during the *argument in the court below,* and it still contends, that the activities carried on, by the defendants through the defendant association * * * have caused a much greater uniformity of prices than could possibly have obtained under conditions of free and unrestricted competition." (P. 152.)

The *record* does not show *what* "the Government contended during the *argument* in the court below."

The Government should not be permitted to take a position here contrary to that taken in the trial court. And the *record* does show that the chief counsel for the Government solemnly assured the trial court:

> "*We are not insisting on uniformity.*"

Moreover, in the Government's petition the ultimate conclusion that there existed an unreasonable restraint of interstate trade and commerce was deduced from the alleged fact that there existed *a practical uniformity among the defendants of both "f. o. b. selling prices" and "net delivered prices."* In the Government's brief, however, we are informed that the Government's contention is that there was *"a much greater uniformity of prices* than could possibly have obtained under conditions of free and unrestricted competition." In other words:

1. *The petition is abandoned.*

2. An unreasonable restraint of interstate trade and commerce is *assumed.*

"Free and unrestricted competition" is a mere economic concept, and is descriptive of no condition that has ever existed since the dawn of time.

The learned writer of the Government's brief therefore proclaims his utter innocence when he solemnly talks of *free and unrestricted competition.*

Furthermore, *it is elementary that competition tends to produce uniformity of price.*

Evolution of Modern Capitalism (Hobson), 146.

Principles of Economics (Taussig), Vol. I, pp. 480-481, 134, 141, 144-45, 147, 146, 153-154, 172-173, 175; Vol. II, p. 38.

Readings in Industrial Society (Marshall), pp. 934, 476-77.

Such is also the undisputed evidence (Vol. II, pp. 544-545). Therefore, when counsel impliedly asserts that free and unrestricted competition produces great price variation he convicts himself of not being familiar with elementary economic principles.

The variation in the prices quoted or obtained by the members of the defendant association is altogether unusual. It should not exist, and would not exist in a perfectly organized society. While

the fact of variation proves *absence of agreement* among the defendants, and that the exchange of statistics has not effected the results feared by the Government, it also proves that the economic mechanism is by no means perfect.

And what proof is there in the *record*—for we assume that counsel's unsupported assertion cannot properly be called *proof*—that the defendants' activities "have caused a much greater uniformity of prices than could possibly have obtained" had the association not existed?

Learned counsel also asserts that the Government has never contended that there was "an absolute uniformity in the prices obtained by the defendants." True, but the petition does charge that the defendants—

> "have always maintained * * * and they still maintain *a practical uniformity* between themselves of net f. o. b. selling prices" (Vol. I, p. 6) and "of net delivered prices" (Vol. I, p. 7).

This means a *substantial* uniformity, and we have shown that it has never existed. In order to close up the wide gulf that exists between the petition and the proof, learned counsel argues that there is a difference in the quality of the flooring manufactured by the different members; that the machine-work of some members is superior to that of others, and that flooring is not a fungible com-

modity, etc., etc., and that these facts find expression in the prices. But all this merely convicts counsel of disingenuousness, or else constitutes an abandonment of another contention made in the petition. In the petition it is charged:

> "The use of the uniform trade-mark and the character of the advertising put out by the association intensify the tendency to establish and maintain uniform prices, and *also practically eliminate* all *competition between the defendants based on the quality of their respective products*" (Vol. I, p. 10, fol. 19).

Moreover, counsel's assertion that—

> "Other witnesses testified that in their opinion the flooring produced by Horner is inferior and is therefore unable to command as high a price as other mills obtain" (p. 153),

is not supported by the facts. One witness and one witness only testified that *before* Horner joined the association his grades were unsatisfactory. No one testified as to Horner's grades *after* he had joined the association (Vol. I, p. 431).

It is next asserted by learned counsel—and his so-called "argument" consists largely of mere assertions—that the defendants' plan and activities—

> "necessarily and inevitably have caused increases in prices to be made more rapidly and decreases in prices to be made less

> rapidly than would have been the case without such operation under the plan." (P. 154).

But where is the *proof* to support counsel's assertion? The *Government* offered *none* whatsoever. The undisputed proof offered by the defendants is to the contrary. See pages 216-226, 209-215 of our opening brief for the undisputed evidence that the price advances in the "Product" were not so sharp as those of other commodities; that the price declines of the "Product" were more precipitious than those of other commodities, and that the relation between the prices of the "Product" and the supply and demand was unusually intimate.

The writer of the Government's brief lacks frankness in the discussion of the proposition that the commissions allowed should not be deducted from the delivered prices in reducing the prices made by defendant association members to a common basis for the purpose of comparison with the average costs. The explanations now given do not accord with the statements made by counsel for the Government to the trial court. We quote from the record:

> "Mr. THOMPSON: * * * We started out first deducting the commission, and then showing the net factory price, less the commission. We found from these *minimum price plan statements* that that was not the method they followed, so we changed."

> The COURT: Very well. Mathematics is an exact science.
>
> Mr. FOWLER: I wish to call your Honor's attention to this Minimum Price Basis" (Vol. II, p. 857).

See also Volume II, pages 854-855, where both Mr. Fowler and Mr. Thompson expressly based their contention upon the provisions of the Minimum Price Plans and the Minimum Price Basis.

Having received a copy of the appellants' brief, wherein it was pointed out that all Minimum Price Plans, as well as the Minimum Price Basis, were annulled and abandoned long before the organization of the present association (p. 339), counsel for the Government found it expedient to change their theory, especially in view of the fact that the Weekly Sales Reports included in the Lewis compilations are mostly sales reports issued by the present association.

The writer of the Government's brief advances no reason whatsoever why the commissions allowed should not be deducted. He merely asserts that

> "It is obvious that it is the Cadillac Base Price which must be considered when determining whether the so-called average costs have been maintained as minimum prices." (P. 157.)

By Cadillac Base Price the writer of the Government's brief means a delivered price that includes

commissions, but that does not include freight. If the proposition were so obvious, it is somewhat strange that counsel did not vouchsafe the reasons therefor, especially in view of the fact that he no longer relied upon the reasons advanced to the trial court by Mr. Fowler and Mr. Thompson.

The use of any term "Cadillac Base Price" is without any justification whatsoever. The test runs issued by the present association determine the "approximate relative average costs of flooring product f. o. b. cars at flooring mills." See the insert in appellants' brief between pages 274-275. The Cadillac Base was used (theoretically) in conjunction with the old abandoned Minimum Price Plans. It is obvious that there could not be minimum prices without a base or zones. The present association has never used any Cadillac Base, and, as above pointed out, the average costs are not average costs Cadillac Base, but average costs f. o. b. cars at flooring mills.

As pointed out in our opening brief, the Government's theory is that the average costs, the average freight, and the uniform rules as to commissions resulted in a practical uniformity of both "f. o. b. selling prices" and "net delivered prices." In other words, the average costs were minimum prices, and both the average freight and uniform commissions were factors which resulted in the uniformity of "f. o. b. Selling Prices" and "Net Delivered Prices" (p. 342). Of course, if freight

is deducted, the commissions allowed should also be deducted. The Lewis compilations relate to shipments to points throughout the United States from the different association mills. In some instances commissions were allowed, but in other instances they were not allowed. The amount of the commissions allowed also varied. In order to determine whether there was either a practical uniformity of prices or whether the average costs were maintained as minimum prices, the commissions allowed as well as the freight should be deducted from the delivered price. *Only by this means can the heterogenous mass of data be reduced to a common basis.* An association mill that quoted a delivered price *not subject to commission* of course received from the purchaser a net amount, which consisted of the delivered price less the freight. On the other hand, an association mill that quoted a delivered price *subject to a commission* received from the purchaser a net amount which consisted of the delivered price less the freight and less the commission. If the Cummer-Diggins Company at Cadillac, Michigan, quoted a Washington, D. C., lumber dealer a delivered price of $108.50 per thousand feet and the freight were $8.50 per thousand feet the Cummer-Diggins Company would realize $100 net per thousand feet for the flooring.

If, on the other hand, Cobbs & Mitchell, of Cadillac, Michigan, should sell another Washington lumber dealer similar flooring at $108.50 delivered, less a commission of $2 per thousand feet, Cobbs &

Mitchell would net only $98 per thousand feet. In other words, both the prices realized by Cobbs & Mitchell and Cummer-Diggins would vary, and the prices paid by the two Washington lumber dealers would vary. Therefore it is clear that in order to determine whether there was a practical uniformity in the prices obtained by Cummer-Diggins and Cobbs & Mitchell, $98 would have to be compared with $100. It is equally clear that in order to ascertain whether the average costs were maintained as minimum prices the average cost of the flooring sold by Cobbs & Mitchell and Cummer-Diggins to the two Washington lumber dealers would have to be compared with $98 and $100. The evidence was that the allowance of commissions is merely a means of meeting competition or reducing one's price (Vol. II, p. 538).

It also appeared that some members allowed a commission of 5 per cent (Vol. II, p. 452). Suppose, for instance, that some of the members of the defendant association should allow commissions similar to those allowed by the hardware trade, viz., a price less 20 per cent, 10 per cent, and 5 per cent. It would be the height of absurdity to compare the gross price with anything whatsoever. Only the net price after the deduction of the chain discount could be used with any regard whatsoever for the substance of things. It is significant that the Government first began to deduct the commissions as well as the freight (Vol. IV, pp. 584-694). The

explanation given for its abandonment of that method was the provisions of the Minimum Price Plan and the Minimum Price Basis. And in view of the undisputed fact that the Lewis compilation is based almost entirely on the Weekly Sales Reports issued by the present association, there is no justification for the change in the Government's method.

The real reason why both commissions and freight should be deducted is stated on page 342 of appellants' opening brief.

The Government's brief is full of inconsistencies. Whenever it suits its purposes to treat all the associations as one association it does so; however, whenever it is convenient to treat the present association as having come into existence for the first time on March 29, 1922, it also does so.

The writer of the Government's brief also asserts that a comparison of the average costs with the prices realized demonstrates the soundness of the Government's contention that the so-called average costs "are in fact recommended prices, and that they exert a strong influence on the members' actual selling prices." The Government's petition alleged *not* that the average costs exerted a strong influence on the "members' actual selling prices," but that the average costs were maintained as *minimum prices* by the defendants, and that as a result thereof there was a practical uniformity of both

"net f. o. b. selling prices" and "net delivered prices." Neither in the putting in of its proof in the trial court nor in the making of its argument in this court has the Government paid any attention whatsoever to the fundamental rules that proof without pleading or pleading without proof is insufficient to support a decree.

X.

"Economic Defense."

The writer of the Government's brief quotes Mr. John Knox Arnold and the trial court in opposition to the testimony given by Professors Hettinger and Vonderblue and Mr. Gordon and Mr. Grant Keehn. Of course, Judge Sessions does not claim to be an economist or learned in that science. We feel that it was unfortunate for the defendants that such was the fact. Even a casual reading of the testimony of Mr. John Knox Arnold will show that he was an extremely partisan witness.

It is absurd to say that the elaborate charts, whose correctness not even Mr. Arnold attempted to impugn, and the other data prepared by Messrs. Gordon and Grant Keehn and endorsed by Professors Hettinger and Vanderblue have no relevancy whatsoever. If the defendants had controlled and manipulated the prices of maple, beech, and birch flooring, as charged in the Government's petition, certainly the charts and other data pre-

pared by Messrs. Gordon and Grant Keehn would have shown some evidence of such control and manipulation. Of course no one has ever contended that the charts are conclusive evidence that there was no fixation of price. But they are strong circumstantial evidence that there was no control or fixation. The writer of the Government's brief attempts to discount the evidence given by Professors Hettinger and Vanderblue and Messrs. Gordon and Grant Keehn by referring to the Minimum Price Plans, etc. However, the undisputed proof by both the Government's witnesses and the defendants' witnesses was that the Minimum Price Plans were never observed or enforced (Appellants' Opening Brief, pp. 196-206).

It is true that logarithmic charts merely show the direction and rate of change and not the extent and magnitude of the change, but what of it? If the index of the prices of the "Product" fluctuated in harmony with the indices of all commodity prices, all building materials, and lumber prices, as well as with the indices of the prices of competing wood floorings, certainly such fact is strong circumstantial evidence that all the prices represented by the indices were determined by natural economic phenomena, and that none of them were fixed by artificial manipulation. If the defendants had the power to control the prices of flooring it is strange that they did not exert it and stop the decline of 13/16 x 2¼ face, clear maple flooring

from $225 in May, 1920, to $93.94 in May, 1921. During the same period of time No. 1 flooring of the dimension above mentioned declined from $189.87 per thousand feet to $76.42, and Factory Flooring of the same dimension declined from $168 per thousand feet to $43.06 per thousand feet (Vol. IV, fols. 5455-57).

The proof also showed that the index of the price of the "Product" fluctuated in harmony with the index of the prices of rough maple lumber. (See Appendix O, p. 24, Appendices to Appellants' Brief.) The undisputed proof, also, was that the index of the price of the "Product" was peculiarly sensitive to the unfilled orders and stocks on hand. (See Appendix Q, p. 21, of Appendices to Appellants' Brief.)

XI.

"Discussion of the Law."

In the Government's brief it is asserted that in order for the Government to make out a case

> "it is sufficient to prove the adoption of a plan or scheme which in its operation necessarily affects the prices." (P. 182.)

It is apparent that the writer of the Government's brief does not agree with the learned District Court, who said that

> "The actual results flowing from such plans, agreements and the execution and performance thereof are of secondary impor-

> tance. Besides, no method has been discovered and probably none can be discovered by which to measure either accurately or even approximately the effect of the agreements and doings of these defendants upon prices, production and competition in the maple, beech and birch flooring industry, for the reason that there are no satisfactory standards of comparison" (Vol. I, p. 59).

Upon the trial court's statement and the principles announced by this court in the Steel Corporation case, the appellants are entitled to a reversal of the decree entered by the District Court. The same principles were announced and applied by this court in the American Column and Lumber Company case. The test there announced was

> "whether the system of doing business adopted resulted in that *direct and undue* restraint of interstate commerce which is condemned by this anti-trust statute."

If, as the District Court held, the proof did not show what effect the activities of the defendants had had upon prices, production or competition, then clearly there was no proof of "that direct and undue restraint of interstate commerce which is condemned by this anti-trust statute."

In the second place, mere proof of the adoption of a plan or scheme "which in its operation necessarily affects the prices" is not sufficient to sustain the decree that was entered by the District Court.

The test stated by the writer of the Government's brief does not accord with the test announced by this court in the American Column & Lumber Company case. Moreover, the decree entered by the District Court must be sustained, if at all, upon the allegations of the Government's petition and the proof, which must agree. Having alleged that the plan and activities of the defendants resulted in a practical uniformity of both "net f. o. b. selling prices" and "net delivered prices," the Government cannot now sustain the decree entered by the lower court upon the theory that the defendants' plan "in its operation necessarily affects the prices."

In the Government's brief it is also asserted:

> "2. The question of fact is: Does the operation of the scheme materially affect the prices or production of the commodity moving in interstate commerce?" (P. 182.)

As above pointed out, such is not the question. The question is "whether the system of doing business adopted resulted in that direct and undue restraint of interstate commerce." In other words, does the proof show an unreasonable restraint of interstate commerce?

In the second place, there is no evidence whatsoever that the defendants' plan has affected production other than the undisputed proof that by means of the statistics the defendants are advised of what

items of flooring there is a shortage, and that thereupon they manufacture such flooring, to the great benefit of the public (Appellants' Opening Brief, pp. 327-330).

The writer of the Government's brief also asserts:

> "3. As heretofore shown, the operation of the association brought about uniformity of price in about fifty per cent of the sales of the most important kind of flooring made between October, 1921, and June, 1923, and prices equal to or in excess of the so-called cost price in at least 82 per cent of the sales during that period. But it is wholly unnecessary to prove that the operation of the scheme or plan does or will produce uniformity of prices." (P. 183.)

The assertion of counsel is based upon the Lewis compilations, which, as we have heretofore demonstrated are inaccurate, for the reason that the commissions allowed were not deducted in arriving at figures with which to compare the average costs.

In the second place "fifty per cent of the sales of the most important kind of flooring" amounts to only 17½ per cent of the total production of the defendants (Appellants' Opening Brief, p. 337). Eighty-two per cent "of the most important kind of flooring" would amount to only 28.7 per cent, inasmuch as 13/16 x 2¼ inches face Clear Grade Flooring amounts to only 35 per cent of the total

output of association members. It should also be observed that the writer of the Government's brief has not a word to say concerning Appendices U, V and W, pages 25-64 of the Appendices to Appellants' Brief. Those appendices cover other grades and sizes of maple flooring.

Moreover, as shown in our opening brief, the essence of the Government's petition is that the defendants' plan resulted in a practical uniformity of both "net f. o. b. selling prices" and "net delivered prices." It will not do at this late date for the Government to assert that it is unnecessary to prove that the operation of the defendants' "scheme or plan does or will produce uniformity of prices." It is elementary that proof without pleading or pleading without proof is insufficient to support a decree.

The writer of the Government's brief also asserts:

> "The question is, are prices made higher or lower than they would be if controlled entirely by the natural law of supply and demand?" (P. 183.)

It is pure speculation whether the prices obtained by the defendants would have been higher or lower if the plan had not been in operation. At any rate, the Government offered no proof whatsoever on the subject. The undisputed proof adduced by the defendants in the court below was that the prices obtained by the defendants were

unusually sensitive to the supply and demand, as shown by the stocks on hand and unfilled orders of the defendants. The statisticians and economists who testified for the defendants stated that in their opinion the evidence showed that flooring prices had been fixed by supply and demand. The proof was undisputed that the prices of association members were generally lower than the prices of nonmembers, although association flooring was superior to the flooring manufactured by nonmembers. The proof also was that each defendant determined his own prices, and that at all times since the organization of the present association each member had been free to conduct his business as he saw fit, and that he had done so. In the face of all of this evidence it is worse than idle for the Government to assert that the prices obtained by the defendants were higher than they would have been if the present association had not existed.

The Government cannot take cover behind the Hardwood Company case, as it attempts to do, by the assertion that in that case "great reliance was had by the members of the association upon the fact that there was never a condition approaching uniformity." From the majority opinion it would appear that the petition in the Hardwood case differed essentially from the petition in the case at bar. On page 391 (257 U. S.) it is stated:

> "The bill alleged in substance that the plan constituted a combination and conspiracy to restrain interstate commerce in

> hardwood lumber by restricting competition and maintaining and increasing prices in violation of the antitrust Act of 1890, c. 647, 26 Stat. 209."

As we have heretofore pointed out, the essence of the petition in the case at bar is the practical uniformity of both "net f. o. b. selling prices" and "net delivered prices."

Contrary to the assertion of the writer of the Government's brief this court, in the Hardwood case, did not hold

> "that while it was perfectly apparent that there was no understanding to fix prices, yet the scheme when operated induced every one to get the highest prices he could and gave him the exact information which enabled him to extort the highest prices." (P. 184.)

As pointed out in our opening brief, the decision of this court in the American Column case turned upon the finding that the purpose of the combination was both to limit production and to increase prices, regardless of cost, and that such purpose had been consummated.

The writer of the Government brief also asserts that "the effort of the association members is to get all they possibly can and to aid each other in getting it."

There is no evidence whatsoever to justify any such assertion. The Government's own witnesses

testified that there was intense competition between nonmembers and members. Lumber dealers were unanimous in their testimony that intense competition existed among the defendants.

The writer of the Government's brief also says:

> "And when they all by tacit understanding have in mind a minimum price it will result in more or less uniformity at or about that price with now and then a sale below and more often a sale above that price. But there will generally be enough variation to enable them to 'point with pride and confidence' to the lack of uniformity and especially to the spread in prices. The spread, however, means but little, as a small sale for peculiar reasons may be made at a very high price while a very large sale may be made at a specially low price; thus making a very considerable spread between them." (P. 185.)

It would be difficult to imagine a more disingenuous argument than the argument above quoted. For Government's counsel to say that average costs were minimum prices, when the great bulk of all the flooring produced by the present association was sold at prices considerably below the average cost, is wholly inexcusable. In the second place, the *Government* and not the defendants raised the question of uniformity. The Government in its petition asserted that the defendants' activities had resulted in a "practical uniformity" of prices.

Moreover, the assertion of the writer of the Government's brief that the spread between the high and low prices received arose out of sales of small quantities at very high prices, "made for peculiar reasons," and sales of large quantities at specially low prices, is not true, as an inspection of Exhibits U, V, and W (pp. 25-64) of Appendices to Appellants' Brief will show. Of course it is true that retail sales of small quantities made by Chicago and St. Paul members were usually at higher prices than sales of larger quantities. But all such sales in the Lewis compilations are recorded as *mill* sales, as, for instance, pages 660-661, volume IV. The percentage of such sales is very small.

The writer of the Government's brief does not attempt to refute the soundness of our criticism of certain dicta appearing in the majority opinion of this court in the American Column and Lumber case, as well as some other *dicta* appearing in the opinion in the Linseed Oil case. It was apparently much more agreeable to the writer of the Government's brief to reiterate *dicta* which, we respectfully submit, are unsound. Inasmuch as the writer of the Government's brief has not attempted to answer our criticisms, there is no need of again going into the matter here.

The height of absurdity is reached in the assertion that

> "there the unnatural relationship was brought about by each member making an

> independent contract with the Armstrong Bureau; while here, as in the Hardwood case, it is consummated through an association composed of the individual defendants." (P. 187.)

The anti-trust act does not condemn unnatural relationships between business men. What is an unnatural contract?

It is asserted in the Government's brief:

> "5. If it be not shown that the necessary effect of the scheme or plan is to restrain interstate commerce, yet its operation should be enjoined if it be shown that it can be so used and that it is the intent of the parties to so use it." (P. 188.)

In the first place there is no proof whatsoever of the intent of the defendants to use their present plan for the purpose of violating the anti-trust act. In the second place, if the *necessary* effect of the plan is not to unreasonably restrain interstate commerce, how can such plan be used to restrain interstate commerce? And under such circumstances what difference does the intention of the parties make? As held by this court in the Steel Corporation case, *it is not the possession of power,* but the *wrongful exertion of it that counts.* If, as in the case at bar, a plan has been in operation for more than two years without resulting in an unreasonable restraint of interstate commerce, an injunction would not be justified, for the reason that the

anti-trust act condemns only contracts, combinations or conspiracies which do or which would if enforced unreasonably restrain interstate trade or commerce. The case of Patten *vs.* U. S., 226 U. S., 525-543, cited by the writer of the Government's brief, does not sustain the contention made in the Government's brief. Neither do the other authorities there cited, and it is unnecessary to criticize them at length. *The Government's petition does not allege that the defendants entered into the present plan with an unlawful intent.* The Government's failure to allege such unlawful intent was urged in the defendants' motions to dismiss said petition in the lower court (Vol. I, pp. 23-24).

It is also asserted by the writer of the Government's brief:

> "9. The contention that the association created only a reasonable restraint upon interstate commerce is devoid of merit." (P. 193.)

The appellants have never made any such contention. Our position is and always has been that the Government failed to prove that an unreasonable restraint of interstate trade or commerce has ever existed since the organization of the present association. We also contended in our opening brief that, inasmuch as the present articles of association do not expressly deal with output or prices, the Government's petition should have been dismissed because the undisputed proof showed

that the defendants' prices were and always had been fair and reasonable. In other words, our position is that in the absence of an *express* agreement as to prices or output or an express agreement which deprives the parties to it of their discretion as to output or prices, there cannot be an unreasonable restraint of interstate commerce, if each party to such an agreement fixes his own prices and determines his own output, provided output is not curtailed and the prices are fair and reasonable.

The Circuit Court of Appeals for the Sixth Circuit, in Addyston-Steel Company case, did not hold that whether a restraint is reasonable or not depends upon the character of the agreement or agency that brings it about, and not upon the extent of the restraint. Even if the court had so held, such a holding would be a pure *dictum* for the reason that the proof in that case showed an express agreement which unreasonably restrained interstate trade or commerce. In that case the agreement by its own terms did so. It was made for no other purpose. It necessarily could not have any other effect. The articles of association in the case at bar have various provisions relating to divers subjects, none of which expressly deal with output or prices. None of the provisions interfere with or in any wise limit the discretion of association members with respect to output or prices; and under these circumstances the test of the unreasonableness of restraint depends upon the extent or degree of the restraint.

Under the caption "10 The relief to which the Government is entitled" the Government asserts that the appellants' position is that

> "the court should specify what particular things the association can do, and so limit the injunction as to exclude such activities from its provisions. But to comply with such contention would be for the court to undertake to construct an association for the defendants which, according to the court's view, would be a legitimate one." (P. 196.)

The appellants have never made any such contention. The appellants do contend that if some part or parts of defendants' plan should be deemed objectionable the injunction should merely restrain the defendants from carrying out such part or parts. This court has frequently done this in cases arising under the anti-trust act and courts have been exercising similar functions since time immemorial, especially courts of equity.

The assertion that no property rights are involved in the case at bar is demonstrably unwarranted. At great expense the defendants have maintained a reinspection service and have standardized the flooring manufactured by them. The proof shows that the defendants have built up a good will of immense value. This good will should not be destroyed and the public should not be injured by depriving it of the benefits of the reinspection service and of standardized flooring. The

court will recall that the proof was that architects specify flooring manufactured by the defendants or flooring manufactured according to its grading rules; that a great many lumber dealers will not buy flooring from non-members, and that all the lumber dealers who testified stated that they preferred to deal with members of the association because of the superior quality of the flooring manufactured by them, and because of the protection that the reinspection service afforded buyers.

Respectfully submitted,

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